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NO. 80-

In the Supreme Court of the United States

October Term, 1980

EASTERN AIR LINES, INC.
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §623(f)(2) (1975), as originally enacted, required a demonstration of either a non-discriminatory, business purpose or the payment of substantial benefits to avoid a finding of subterfuge where the mandatory retirement age in a retirement plan was reduced after the passage of the ADEA.[1]

[1]The parties to this proceeding in the Fifth Circuit are Eastern Air Lines, Inc., Appellant, and the Equal Employment Opportunity Commission.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Eastern Air Lines, Inc. ("Eastern") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 14, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is attached as Appendix A hereto. The opinion and order of the United States District Court for the Southern District of Florida is reported at 474 F. Supp. 364 and is attached as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 14, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are §4(a)(1) and §4(f)(2) of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), which are reproduced as Appendix C hereto. 29 U.S.C. §§623(a)(1), (f)(2) (1975).[2]

[2]All references to §4(f)(2) of the ADEA, except where otherwise noted, are to the statute prior to the 1978 amendments. The amendments provided, in pertinent part, that no employee benefit plan "shall require or permit the involuntary retirement of any individual . . . because of the age of such individual."

STATEMENT OF THE CASE

A. Background

This action was brought on August 23, 1977 alleging that Eastern violated §4(a)(1) of the ADEA in that its retirement income plan for its flight attendants in effect from January 1, 1974 through June 30, 1977 provided for retirement at 62 years of age. The mandatory retirement age had been lowered from 65 to 62 in 1973, six years after the passage of the ADEA.

On July 26, 1979 the United States District Court for the Southern District of Florida granted the Plaintiff's Motion for Summary Judgment. The District Court held that the retirement plan with its lowered mandatory retirement provision was a "subterfuge to evade the purposes of the ADEA" and was not entitled to the exemption of §4(f)(2) because Eastern had not come forward with any "business purpose" justifying the amendment to the Plan.

Eastern appealed the District Court's decision to the Fifth Circuit. On April 14, 1981, that Court affirmed the lower court's finding. The Fifth Circuit held that Eastern was not entitled to the §4(f)(2) exception because Eastern had not demonstrated a "lack of wrongful intent."

B. Statement of Facts

Eastern's flight attendants are employed under the terms of a collective bargaining agreement between Eastern and their collective bargaining agent, the Transport Workers Union ("TWU"). Since October 1,

1947, Eastern has had in effect a formal retirement benefit plan for its flight attendants, the "Eastern Air Lines Fixed Benefit Retirement Income Plan" ("Plan"). Participation in the Plan, by its own terms, is voluntary and is limited to persons whose employment with Eastern was pursuant to the labor agreement with the TWU.

During the period from October 1, 1947 up to and including December 31, 1973, the flight attendants' labor agreement and the Plan provided that a flight attendant must retire at age 65—the "normal retirement age" defined in the Plan. As of January 1, 1974 and through June 30, 1977, the labor agreement and the Plan established age 62 as the "normal retirement age." Since July 1, 1977 both the collective bargaining agreement and the Plan have been amended to continue age 62 as the "normal retirement age" but to allow the flight attendant the option to continue working to age 65.

The normal retirement age was reduced from age 65 to 62 as of January 1, 1974 as a direct consequence of labor negotiations between Eastern and the TWU over the union's long standing proposals for such a change. In each of the years 1962, 1964 and 1972, the TWU had proposed during labor negotiations that the normal retirement age for its members be reduced to age 60. As a result of the 1972 proposal, Eastern and the TWU entered into a letter of agreement dated April 26, 1973 providing that effective January 1, 1974 the normal retirement age for flight attendants would be age 62 but that the level of benefits payable would equal the amount that the employee would have received with retirement at age 65.

At the onset of negotiations in 1974 for a new labor agreement, the TWU proposed that the retirement age be further lowered to age 60 with an option to continue working to age 62. Thereafter, on July 15, 1974, the TWU amended its proposal to provide an option to work to age 65 with benefits continuing to accrue after age 62. This action was purportedly taken because the TWU's attorney believed that the union's age 60 proposal could have been unlawful. There was no further discussion of the amended proposal until the last days of the negotiations in the late Fall of 1974. At that time Eastern stated that its attorneys believed that the age 62 retirement provision of the existing plan was lawful. The Department of Labor's Wage-Hour Administrator's interpretation of the ADEA's §4(f)(2) exception, 29 C.F.R. §860.110(a) (1975), along with various opinion letters, supported Eastern's view. Moreover, the only Circuit Court opinion which at that time had been rendered, the Fifth Circuit's decision in *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) on September 9, 1974, was not inconsistent with Eastern's interpretation. There was no attempt by either party at further negotiation on this issue and the TWU on its own initiative withdrew its amended proposal. The age 62 retirement provision of the 1973 agreement, which had been proposed by the TWU, was continued in the 1974 labor contract. The level of benefits payable to those retired at age 62 was the same amount that they would have received had they retired at age 65. At no time thereafter did the TWU ever question the lawfulness of the age 62 retirement provision nor did it ever object to the retirement of its members at age 62 pursuant to the Plan's terms.

Eastern had never sought a reduction in the retirement age nor had it ever insisted on its continuance in the 1974 labor contract. Eastern had agreed to the union's proposal as part of the normal give-and-take of negotiation.

C. The Opinions of the Lower Courts

The District Court found that the lowering of the mandatory retirement age from 65 to 62 was unlawful as this change in the Plan was a subterfuge to evade the purposes of the ADEA. The Court held that a post-ADEA reduction in the mandatory retirement age must have some "business purpose other than arbitrary age discrimination", (Appendix B at App. 25), and that Eastern had failed to come forward with any such business justification. The Court found that the Plan paid "substantial benefits." However, it then specifically rejected the Third Circuit's analysis in *Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978), that a retirement plan which pays substantial benefits cannot be a subterfuge regardless of when the lower age was established. (Appendix B at App. 21, 26).

The Fifth Circuit in affirming the District Court held that where there is a post-ADEA lowering of the mandatory retirement age, "the burden is especially onerous upon that employer to demonstrate lack of wrongful intent and, absent an affirmative showing of non-discriminatory purpose, the court is justified in finding a violation." (Appendix A at App. 12). The Fifth Circuit did not find Eastern's explanation that it agreed to the age 62 retirement term as part of the give-and-

take of labor negotiations as being sufficient to establish such a non-discriminatory purpose.

REASONS FOR GRANTING WRIT

The judgment of the Court of Appeals is in conflict with decisions on the very same issue by three other Circuits. The Third and Ninth Circuits in analyzing the §4(f)(2) exception have adopted a "substantial benefits" test; i.e., a retirement plan that pays substantial benefits cannot be a subterfuge. *Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir. 1977); *Sikora v. American Can Co.*, 622 F.2d 1116 (3rd Cir. 1980); *Marshall v. Hawaiian Tel. Co.*, 575 F.2d 763 (9th Cir. 1978); *EEOC v. Shell Oil Co.*, 637 F.2d 683 (9th Cir. 1981). The Sixth Circuit, though somewhat indirectly, has applied the same test. *Carpenter v. Continental Trailways*, 635 F.2d 578 (6th Cir. 1980), *cert. denied* 49 U.S.L.W. 3852 (May 19, 1981).

The Fourth and the Seventh Circuits have adopted a "business purpose" test; i.e. a post-ADEA reduction in mandatory retirement age must be justified on some business related basis. *EEOC v. B. & O. R.R.*, 632 F.2d 1107 (4th Cir. 1980); *Smart v. Porter Paint Co.*, 630 F.2d 490 (7th Cir. 1980). The Fifth Circuit has offered somewhat of a variation on this "business purpose" analysis. Under the Fifth Circuit's interpretation of the §4(f)(2) exception, an employer must demonstrate a lack of wrongful intent and affirmatively show a non-discriminatory purpose. (Appendix A at App. 12).

This Court, in *United Air Lines, Inc. v. McMann*, considered the mandatory age 60 retirement term of a plan which pre-dated the ADEA and rejected any "*per*

se rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act." 434 U.S. 192, 203 (1977). However, the Court's decision is silent as to whether a "business purpose" test should be applied to post-ADEA plans adopting or lowering a retirement age below 65.

The Circuit Courts which have applied a "business purpose" analysis have all read *McMann* as requiring an employer to state some economic purpose for a reduced retirement age.[3] In contrast the Third, Sixth and Ninth Circuits in post-*McMann* decisions have not required evidence of employer intent but rather have relied upon evidence that a retirement plan pays substantial benefits in order to find an employer within the §4(f)(2) exception.

These cases all turn on a resolution by this Court of the proper application of the "subterfuge" language of the statute to post-ADEA plans having a mandatory retirement age below 65. This is an important question of federal law which must be clarified. While the statute has been amended to modify §4(f)(2), there remain pending in the lower Courts a number of cases involving the correct meaning of subterfuge. These cases will determine the retirement and reinstatement rights of large numbers of employees and the damages which may be assessed against affected employers.

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[3]Three reported cases at the District Court level have adopted the "business purpose" analysis. *EEOC v. Home Ins. Co.*, ____F. Supp.____, 25 Emp. Prac. Dec. ¶31,556; (S.D.N.Y. 1981); *EEOC v. Consol. Edison Co.*, ____F. Supp.____, 25 Emp. Prac. Dec. ¶31,558, (S.D.N.Y. 1981); *Marshall v. Atlantic Container Line*, 470 F. Supp. 71 (S.D.N.Y. 1979).

THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS BY THE THIRD SIXTH & NINTH CIRCUITS

There is a direct and clear conflict among the various circuits as to the meaning of "subterfuge" in the Section 4(f)(2) exception. Those Circuits which have adopted the "substantial benefits" test have done so on the basis of the language of the statute, the intent found in the legislative history and contemporaneous interpretations by the Department of Labor. The Circuit Courts following the "business purpose" test view *McMann* as requiring an examination of employer purpose and motive in any post-ADEA reduction in the retirement age whether by amendment to an existing plan or adoption of a new plan.

The "substantial benefits" test was set forth in detail by the Third Circuit in *Zinger v. Blanchette*, 549 F.2d at 905-910, and in Justice White's concurring opinion in *McMann*, 434 U.S. at 204-208. The *Zinger* case involved a retirement plan which pre-dated the ADEA but the Third Circuit did not rely on that fact as being controlling. Rather it found the plan lawful because it was a bona fide one providing a "not unreasonable" pension and, therefore, was not a "subterfuge." 549 F.2d at 909. The Third Circuit noted that:

> The primary purpose of the Act is to prevent age discrimination in hiring and discharging workers. There is, however, a clear, measurable difference between outright discharge and retirement, a distinction which cannot be overlooked in analyzing the Act. While discharge

without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor. 549 F.2d at 905.

The Third Circuit re-affirmed this interpretation of the Section 4(f)(2) exception in *Sikora v. American Can Co.*, 622 F.2d 1116 (3rd Cir. 1980). There the Court held that in light of *McMann*, a post-ADEA plan must be examined to determine the adequacy of the pensions paid. Revisions in a plan that substantially reduced benefits could constitute a subterfuge to evade the purposes of the Act. *Id.* at 1124.

The Ninth Circuit in *Marshall v. Hawaiian Tel. Co.*, 575 F.2d 763 (9th Cir. 1978), *aff'g. sub nom., Dunlop v. Hawaiian Tel. Co.*, 415 F. Supp. 330 (D. Haw. 1976), affirmed a similar District Court interpretation of the 4(f)(2) exception. The lower court had found that "subterfuge" referred to an attempt to constructively discharge an older employee through the mechanism of a retirement plan. Therefore, a constructive discharge would result from retirement on an unreasonably small pension. The District Court accordingly held that "[t]he 'subterfuge' involved is not the act of termination on the basis of age but the failure to pay the employee sufficient retirement benefits following such a termination." 415 F. Supp. at 333. This interpretation was re-affirmed in the Ninth Circuit's recent opinion in *EEOC v. Shell Oil Co.*, 637 F.2d 683 (9th Cir. 1981).

The Sixth Circuit, in *Carpenter v. Continental Trailways*, 635 F.2d 578 (6th Cir. 1980), considered a retirement plan adopted in 1974 which permitted forced retirement after age 55 at the option of the employer.

The Court found that this post-ADEA plan could not be considered to be a subterfuge to evade the requirements of the ADEA since it had been adopted:

> for the same reason that many companies and governmental agencies have adopted optional retirement plans. Evidence exists that the plan was a legitimate instrument created to provide for the retirement of the company's employees. *Id.* at 581.

The Sixth Circuit did not inquire into the employer's motive or purpose in establishing the plan. The plan was lawful because it was one that paid legitimate benefits.

Justice White in his concurring opinion in *McMann* endorsed the Third Circuit's analysis as to the availability of the §4(f)(2) exception and specifically rejected any business purpose test. He found that:

> Congress intended to exempt from the Act's prohibition all retirement plans — even those whose only purpose is to terminate the services of older workers — as long as the benefits they pay are not so unreasonably small as to make the 'retirements' nothing short of discharges.
>
> Because all retirement plans necessarily make distinctions based on age, I fail to see how the subterfuge language, which was included in the original versions of the bill and was carried all the way through, could have been intended to impose a requirement which almost no

> retirement plan could meet. For that reason I would interpret the §4(f)(2) exception as protecting actions taken pursuant to a retirement plan which is designed to pay *substantial benefits.* 434 U.S. at 8207. (emphasis added).

The Fifth Circuit's decision below directly conflicts with this analysis. The Fifth Circuit read *McMann* as holding that the §4(f)(2) exception "was enacted in order to 'grandfather' those pre-existing plans which might not otherwise have survived judicial scrutiny under the new guidelines." (Appendix A at App. 10). Post-ADEA reductions in mandatory retirement ages were subject to a different standard — the employer must "demonstrate lack of wrongful intent" and make "an affirmative showing of non-discriminatory purpose". (Appendix A at App. 12).

The Fifth Circuit's holding draws no distinction between discharge and retirement. Section 4(f)(2) on its face permits separation from employment because of age where that action is taken pursuant to a retirement plan. This exception does not apply to the involuntary retirement of employees who are not participants in an employer's retirement plan. The ADEA clearly recognizes the difference between retirement with and without a pension. The latter is unlawful while the former is permissible. As Justice White recognized, the lawfulness of the otherwise arbitrary act of forcing pre-age 65 retirement stems from the payment of benefits. As long as these benefits are not so unreasonably small as to make the retirements nothing short of discharges, they are lawful and the plan itself cannot be found to be a subterfuge.

The decision of the Fifth Circuit, as well as those of the Fourth and Seventh Circuits cannot be harmonized with the opinions of the Third, Sixth and Ninth Circuits. There is a clear and direct conflict on this question of federal law. This court in *McMann* did not address the application of the §4(f)(2) exception to post-ADEA reductions in the mandatory retirement age of new or amended plans. Various courts, however, including the Fifth Circuit, continue to read *McMann* as requiring a showing of business purpose to justify post-ADEA plans. This Court should clarify whether the proper standard to determine subterfuge rests upon evidence of an employer's non-discriminatory, business purpose or upon the payment of substantial benefits under a retirement plan.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 9, 1981

APPENDIX

APPENDIX A

United States Court of Appeals
for the Fifth Circuit

NO. 79-3960

D. C. Docket No. 78-316-Civ-SMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

versus

EASTERN AIRLINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before KRAVITCH and THOMAS A. CLARK, Circuit Judges, and LYNNE*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

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* District Judge of the Northern District of Alabama, sitting by designation.

the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that the defendant-appellant pay to the plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

April 14, 1981.

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT B

No. 79-3960

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

versus

EASTERN AIRLINES, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(April 14, 1981)

Before KRAVITCH and THOMAS A. CLARK, Circuit Judges, and LYNNE*, District Judge.

THOMAS A. CLARK, Circuit Judge:

Eastern Airlines, defendant below, appeals a judgment which held that Eastern violated Section 4(a)(1), 29

* District Judge of the Northern District of Alabama, sitting by designation.

U.S.C. §623(a)(1), of the Age Discrimination in Employment Act, 29 U.S.C. §621(a) *et seq.*, (hereinafter the "Act"), by altering its "normal retirement age" from 65 to 62 after passage of the Act. The district court found that the lowered mandatory retirement provision was a "subterfuge to evade the purpose of the Act" and therefore was not exempt under Section 4(f)(2). We affirm.

The facts of the case were stipulated. Eastern Airlines instituted a retirement plan in 1947 known as the Eastern Airlines Fixed Benefit Income Plan for Flight Attendants which required participants to retire at age 65. On April 26, 1973, Eastern and the employee bargaining agent, the Transport Worker's Union (TWU), began renegotiating the retirement plan and, prompted by the Union's request, amended the collective bargaining agreement to provide for "normal retirement" at age 62. The amendment took effect on January 1, 1974.

On July 15, 1974, however, while the TWU was engaged in negotiations on a new contract, the TWU informed Eastern that Union counsel advised it that the lowered retirement age was of questionable legality under the Act. The TWU proposed, instead, that employees be given the opportunity to continue work until age 65. The issue was not discussed further until the final day of negotiations in the fall of 1974, when Eastern advised the Union that its own counsel believed the existing plan was in compliance with the Act based upon their understanding of an Age Discrimination in Employment Act (ADEA) case, *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). Pursuant to the lowered retirement age, Eastern involuntarily retired seven flight attendants between July 1, 1974 and April 1, 1977. On July 1, 1977, Eastern and the TWU again altered the retirement plan to permit employees to work until age 65 if they so chose.

The issues on appeal may be stated as follows:

1. Did Eastern violate §4(f)(2) of the Act when it reduced the normal retirement age from 65 to 62 on January 1, 1974?

2. Assuming the reduction was illegal, is Eastern liable despite the fact that the Union initially requested the reduction during contract negotiations?

3. Assuming liability, was Eastern's violation "willful" for purposes of determining the statute of limitations under the Portal-to-Portal Act (29 U.S.C. §225)?

4. Whether the trial court erred in refusing to join the Transport Worker's Union as an indispensable party under Fed.R.Civ.Pro. 19?

The trial court placed the burden of proving the affirmative defense under exemption 4(f)(2) upon the defendant, and we agree with this allocation. The one claiming the benefits of an exception to a statutory prohibition has the burden of proving the applicability of that exception.[1] Section 4(f)(2) states:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization —
>
> . . .
>
> (2) to observe the terms of a bonafide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this chapter, except

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[1] *See United States v. First City National Bank of Houston*, 386 U.S. 361, 87 S.Ct. 1088 (1967).

> no such employee benefit plan shall excuse the failure to hire any individual; . . .[2]

In considering whether Eastern violated the Act, we consider first *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), because of the fact that Eastern relied upon this case in response to the TWU position that the amended retirement age was illegal. *Taft* involved an action to enjoin an alleged ADEA violation where an employee was involuntarily retired at age 60. The company defended the discharge under the §(f)(2) exception, and this court agreed that the Retirement Plan was "a bona fide employee benefit plan . . . which is not a subterfuge to avoid the purpose of this Act." *Brennan v. Taft Broadcasting Co.*, 500 F.2d at 213. In so holding, the court emphasized especially the timing of the Act's passage in relation to Taft's adoption of the challenged retirement plan:

> Taft's "Plan [retirement benefit plan] was effectuated far in advance of any enactment of the law, eliminating any notion that it was adopted as a subterfuge for evasion.

Id., at 215.

This language is significant to our present inquiry because of the argument Eastern puts forth. Eastern maintains that under *Taft* any retirement plan which is "bona fide," in the sense that the plan "is genuine and

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[2] 29 U.S.C. §623(f)(2).

actually pays substantial benefits,"[3] is necessarily defensible within the §4(f)(2) exemption. Based upon its reading of *Taft*, Eastern argues that the involuntary retirement of these seven employees was permissible because their retirement was pursuant to a "bona fide" retirement plan. But this interpretation is overly simplistic. In addition to requiring the defendant to prove its retirement plan was "bona fide," *Taft* imposed a second burden upon the employer—the burden of establishing that the plan was not a "subterfuge to evade the act." In concluding that it was not, the court stressed one fact: the plan had been adopted prior to the ADEA's passage. Consequently, Taft could not have intended to "evade" an Act not in existence.

In the instant case, however, Eastern's retirement plan was amended subsequent to passage of the Act, and therefore we may not automatically rule out the possibility that the plan was a "subterfuge." Contrary to Eastern's interpretation, *Taft* imposed two distinct burdens upon those employers seeking to fall within the protection of Section 4(f)(2)— first, establish that the plan is bona fide; second, establish that the plan was not adopted as a "subterfuge" to evade the act. The trial court properly focused its attention on both these inquiries[4] and concluded that, despite Eastern's

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[3] *Marshall v. Hawaiian Telephone Company*, 575 F.2d 763, 766 (9th Cir. 1978).

[4] We need not consider here whether Eastern "observed the terms of" the plan as that phrase was interpreted in *Marshall v. Hawaiian Telephone Company*, 575 F.2d 763 (9th Cir. 1978), where the court rejected the contention "that an employer does not 'observe the terms of' a plan by exercising the option permitted by a plan to force retirement on an employee." Here, neither party contends that Eastern did not "observe the terms" of the plan, the sole question being whether such observance was lawful.

payment of substantial benefits, Eastern had failed to prove that the amended plan was not a subterfuge. We agree.

A careful review of those cases which have considered the "subterfuge" question lends strong support to the trial court's analysis. In *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444 (1977), for example, the Supreme Court considered whether the involuntary retirement of an employee before age 65 was permissible pursuant to a "bona fide" retirement plan established prior to passage of the Act. In concluding that the retirement fell within the scope of Section 4(f)(2), the Court stated:

> [W]e find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted before its [ADEA's] passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify *bona fide pre-existing* plans as the Fourth Circuit concluded. In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. ... [S]o read, a plan established in 1941, if bona fide ... cannot be a subterfuge to evade an Act passed 26 years later.

Id., 434 U.S. at 195, 98 S.Ct. at 450 (emphasis added). The Supreme Court's analysis turned on the date of the plan's adoption; as a matter of common sense, pre-Act plans could not have been adopted with an *intent* to circumvent the Act.

As suggested in *McMann*, and as reflected in the legislative history, the enacting Congress was concerned about the effect which the Act would have upon those retirement plans already in existence. Concerned about "wholesale invalidation," §4(f)(2) was enacted in order to "grandfather" those pre-existing retirement plans which might not otherwise have survived judicial scrutiny under the new guidelines. The legislative history strongly supports this interpretation, as for example, where then Secretary of Labor Willard Wirtz was asked what effect the Act would have upon existing pension plans, his response was:

> It would be my judgment . . . that the effect of the provision in 4(f)(2) . . . is to protect the application of almost all plans which I know anything about.[5]

Furthermore, other circuit courts of appeals which have interpreted the subterfuge language have based their reasoning upon the fact that the challenged plans had been adopted prior to the Act. Hence, the Seventh Circuit, in *Minton v. Whirlpool Corp.*, 569 F.2d 1012, 1013 (1978), upheld a "bona fide" pension plan based upon the fact that "there was no dispute over the fact that the defendant's plan was in effect before the enactment of the ADEA"; the Ninth Circuit, in *Marshall v. Hawaiian Telephone Company*, 575 F.2d 763, 766 (9th Cir. 1978), upheld a pension plan in reliance upon *McMann, supra*, reasoning "that [the defendant] Hawtel established its retirement plan in 1931 and the Secretary now

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[5]Hearings on S.830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 53 (1967).

concedes that after *McMann*, Hawaiian Telephone's plan, if *bona fide*, cannot be a subterfuge to evade the purposes of the ADEA"; and the Fifth Circuit in *Mason v. Lister*, 562 F.2d 343, 356 (1977), upheld a retirement scheme pursuant to §4(f)(2) on the basis that "[t]his court has also previously noted that where a retirement scheme predates ADEA, as does the instant program, it is highly unlikely that the plan is a subterfuge to evade the Act."

None of these cases, however, addressed the question whether a pension plan amended subsequent to the Act, was a "subterfuge to evade the Act." We are left with only one circuit court of appeals case which directly considered the question. In *Smart v. Porter Paint Co.*, 630 F.2d 490 (7th Cir. 1980), the employer amended its retirement plan effective January 1, 1976, and the plaintiff was involuntarily retired thereunder. After suit was filed, the company's Director of Personnel submitted an affidavit which stated that the amended plan "was drafted and approved by legal counsel as complying with all applicable laws including the Age Discrimination in Employment Act." 630 F.2d at 492. Despite the employer's apparent good faith, the court held that Porter had presented insufficient evidence to permit the court to conclude, as a matter of law, that the plan fell within the statutory exception. Specifically, the court stated:

> *McMann* established that the term "subterfuge" was to be given its ordinary meaning and strongly implied that evidence of an employer's intent, including its business or economic purpose, may, under some circumstances, be

> relevant to the question whether a plan which authorizes retirement before age 65 is a subterfuge . . . . [T]his does not preclude us from requiring that the employer must state some nondiscriminatory purpose or purposes for its actions if it adopts or amends a plan *after* 1967 and wishes to avail itself of the §4(f)(2) exemption.

In light of *Smart*, we are persuaded that, when an employer amends its retirement plan subsequent to passage of the Act, the burden is especially onerous upon that employer to demonstrate lack of wrongful intent and, absent an affirmative showing of non-discriminatory purpose, the court is justified in finding a violation.

In the instant case the sole non-discriminatory purpose advanced by Eastern is that the amended retirement age was negotiated pursuant to a collective bargaining agreement. Eastern argues, therefore, that because the retirement age was instituted at the request of TWU, Eastern could not have intended to evade the Act. This argument might have some force were it not for the fact that during negotiations this court issued the opinion in *Brennan v. Taft Broadcasting Company, supra.* Counsel for the airline was clearly aware of the decision, the case being cited to the Union in response to their objections to the previously negotiated amendment. Having considered *Taft*, counsel for the airline should have been aware that two burdens would be placed upon employers instituting post-Act amendments to their retirement plans, and that mere proof that the plans were "bona fide" would have

discharged only one of those burdens. Furthermore, despite the Union's initial request for the lowered retirement age in April, 1973, the TWU had withdrawn this position by July, 1974. Eastern's continued adherence to the amended plan in the face of the Union's changed position and in light of this court's reasoning in *Taft* persuades us that Eastern failed to establish a non-discriminatory purpose for its actions, and therefore the trial court was justified in concluding that the amendment was a "subterfuge."

Having considered the primary substantive issues, we turn to the questions whether the district court properly held that Eastern's violation was "willful" for the purpose of determining the statute of limitations under the Portal-to-Portal Act, and whether the district court properly refused to join the Transport Workers' Union as an indispensable party?

Regarding the imposition of the three-year statute of limitations pursuant to the Portal-to-Portal Act (29 U.S.C. §255(a))* Eastern objects to the trial court's finding that Eastern's violation was "willful." Eastern's contention is that its actions were taken in reliance upon the Department of Labor's official interpretation of §4(f)(2), and that this reliance negates bad faith and willfulness. Our court has held that a party's violation

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*29 U.S.C. §225(a) states in relevant part:

> (a) If the cause of action accrues on or after May 14, 1947, — may be commenced within two years after the cause of action accrued . . . except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

committed in good faith may nevertheless be willful. In *Coleman v. Jiffy Jim Farms, Inc.*, 458 F.2d 1139, 1141 (5th Cir. 1972), Judge Wisdom addressed "the question whether a violation committed in good faith may yet be willful," and concluded that it could. Consequently, while the record reflects no bad faith on the part of Eastern, we are bound by the interpretation of "willful" given in *Coleman*, and we therefore affirm.

Finally, in considering whether the Transport Workers' Union was an indispensable party pursuant to Fed.R.Civ.Pro. 19, we look to that rule for guidance. Under subsection (a), persons to be joined if feasible include a party in whose "absence complete relief cannot be accorded among those already parties," or, a party so situated that the disposition of the action in his absence "may have a prejudicial effect on his ability to protect his own interests."[7] Because Eastern's liability is not predicated upon the Union's action, we see no reason why the TWU would fall within the scope of either category. Furthermore, Eastern has failed to demonstrate any fact to support their contention that the Union would be an indispensable party under Rule 19. We therefore affirm the trial court's refusal to join the Union.

AFFIRMED.

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[7] 7 Wright & Miller, *Federal Practice and Procedure* (1971), Civil §1604.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-316-CIV-SMA

RAY MARSHALL, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

EASTERN AIRLINES, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS CAUSE came on for consideration upon the motions of Defendant for Summary Judgment and for Joinder of Local 553, Transport Workers Union of America, AFL-CIO (TWU) as a defendant, and Plaintiff's Cross Motion for Partial Summary Judgment. Thereafter, on August 18, 1978, the parties filed a Pretrial Stipulation herein agreeing to the back wages due and to which employees are entitled to reinstatement should the plaintiff prevail in accordance with the Court's decision as to the applicability of the two or three year Statute of Limitations of the Portal to Portal Act, 29 U.S.C. Section 255. The court having considered the record and the arguments of counsel and being otherwise fully advised in the premises, hereby finds that Defendant's Motions for Summary Judgment and Joinder should be denied and Plaintiff's Motion for Partial Summary Judgment should be granted.

The Secretary of Labor alleges that Eastern Air Lines has violated the provisions[1] of the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621, *et seq.* (ADEA). Defendant admits that it is covered by the provisions of ADEA, that the Secretary did attempt to conciliate this matter, and that the flight attendants involuntarily retired at age 62 (except for John Guthrie whose age was 63) were all retired solely because of their ages, and for no other factors. The Defendant has raised an affirmative defense alleging that the aforesaid retirements were within the exception of Section 4(f)(2) of the ADEA.

STATEMENT OF UNDISPUTED FACTS

Defendant, Eastern Air Lines, Inc., has had in effect since October 1, 1947, a retirement income plan known as the Eastern Air Lines Fixed Benefit Income Plan for Flight Attendants (Plan). Under the terms of the Plan in effect from October 1, 1947, up to and including December 31, 1973, the normal retirement date was the first day of the month coinciding with or the next month following the flight attendant's 65th birthday.

Pursuant to collective bargaining between the defendant and TWU on January 1, 1974, the Plan was

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[1]Section 4(a)(1) of the ADEA states:

Sec. 4.(a) It shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

amended to lower the normal retirement age from sixty-five to sixty-two. On July 15, 1974, TWU, which was involved in negotiations of a new contract with the defendant, informed the defendant that the lowering of the retirement age in the Plan from age 65 to 62 could violate the ADEA. The TWU then proposed that the Plan be amended to allow the defendant's employees the option to retire from age 62 to 65.

The defendant later informed TWU that it was the opinion of its counsel that the lowering of the retirement age was in compliance with ADEA based on their reading of *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (C.A. 5, 1974) (Defendant's Memorandum of Law in Support of Eastern Air Lines, Inc.'s Motion for Joinder p. 3).

The defendant under the terms of the Plan with the amended lower retirement age retired the following flight attendants at the specified age on the stated date solely on the basis of their ages:

NAME	AGE	DATE OF RETIREMENT
Toivo Puotinen	62	May 1, 1976
Edward Schoettly	62	July 1, 1975
John V. Routh	62	June 1, 1975
Matthew Tyndall	62	Sept. 1, 1974
John Steger	63	April 1, 1977
Robert K. McCance	62	July 1, 1974
Leslie Voget	62	July 1, 1974

On July 1, 1977, the defendant and TWU pursuant to collective bargaining amended the Plan to allow the

defendant's employees the option to continue working to age 65.

MOTION FOR JOINDER

The defendant pursuant to Rule 19 and 21 of the Federal Rules of Civil Procedure moved to have TWU joined in the action as a defendant on the grounds that TWU was an indispensable party.

The defendant argued that a labor organization must be joined when the employer has violated the law by reason of its compliance with the terms of the collective bargaining agreement, citing a number of cases decided under Title VII of the Civil Rights Act of 1964.[2]

Plaintiff contended on the other hand that the cases[3] which have been decided under the equal pay provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 201, *et seq.* (hereinafter FLSA) on the issue of joinder of a union are more applicable. The Court finds the decisions cited by the plaintiff persuasive. Under Section 7(b) of the ADEA the Secretary of Labor enforces violations of ADEA and recovers damages through section 17 of the FLSA.

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[2]*See, e.g., E.E.O.C. v. McLean Trucking Co.*, 525 F. 1007 (C.A. 6, 1975); *E.E.O.C. v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (C.A. 6, 1974)

[3]*Dunlop v. Beloit College*, 411 F.Supp. 398 (W.D. Wis. 1976); *Brennan v. Emerald Renovators, Inc.*, 410 F.Supp. 1057 (S.D. N.Y. 1975); Wirtz v. Hayes Industries, Inc., 58 CCH Lab. Cas. Section 32,085 (N.D. Ohio, 1968) (not officially reported)

Therefore, the decisions under the FLSA in regard to joinder of unions are more closely analogous to this matter than those cases decided under Title VII of the Civil Rights Act of 1964.

Pursuant to the collective bargaining agreement, the Plan was amended on July 1, 1977, to comply with the Act, therefore, the remedy sought in this matter will not require any changes in the terms of the collective bargaining agreement. The defendant argues that TWU has an interest in this matter because of the effect reinstatement of senior flight attendants would have on the seniority system. However, the joinder of the union would not have any effect in regard to the seniority system. As the Supreme Court noted in *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747, 778 (1976):

> Certainly there is no argument that the award of retroactive seniority to the victims of hiring discrimination in any way deprives other employees of indefeasibly vested rights conferred by the employment contract. This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest.

The defendant further argues that TWU must be joined in this action since TWU violated Section 4(c)(3) of the ADEA[4] and should pay any monetary judgment equally with the defendant.

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[4]Section 4(f)(3) of the ADEA provides: (c) It shall be unlawful for a labor organization— (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The court in *Brennan v. Emerald Renovators, Inc.*, 410 F.Supp. 1057 (S.D. N.Y., 1975) held that the language of section 6(d)(1) of the FLSA,[5] the section analogous to section 4(c)(3) of ADEA, led to the conclusion that there was no legal basis for recovery by an employer against a labor organization for contribution. That decision is persuasive as to the interpretation of Section 4(c)(3) of the ADEA, therefore, the defendant in this matter could not receive contribution from TWU.

As to whether the Secretary should proceed against TWU for injunctive relief, that decision is best left to the discretion of the Secretary of Labor.

CROSS MOTIONS FOR SUMMARY JUDGMENT

The parties in this action made cross motions for summary judgment. The issue before the court is whether the defendant is entitled to the exemption of section 4(f)(2) of the ADEA where the employees were retired pursuant to a retirement plan in which the retirement age was lowered after the passage of the ADEA.[6]

Section 4(f)(2) of the ADEA provided:

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[5]Section 6(d)(1) of the FLSA provides:

No labor organization, or its agents, representing employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

[6]The ADEA was enacted into law on December 15, 1967.

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual;[7]

The exemption is an affirmative defense and must be plead and proven by the defendant. The defendant must show that it 1) observes the terms of the plan; 2) the plan was a bona fide employee benefit plan and 3) it is not a subterfuge to evade the purposes of the ADEA.

The Secretary did not contend that the defendant failed to observe the terms of the Plan nor that the Plan was not bona fide in the sense that it did not pay substantial benefits. Thus the court must determine whether the defendant's actions were "a subterfuge to evade the purposes" of the ADEA.

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[7]Congress amended section 4(f)(2) of the ADEA by adding:

and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

The plaintiff urges the Court to follow this language as the law at the time of decision; however, since the Court has ruled for the plaintiff on other grounds it is unnecessary to decide this issue.

It is settled that when the Court interprets an exemption or exception to remedial legislation such as the ADEA, the exemption must be narrowly and strictly construed. *See, e.g. Piedmont & Northern Ry. Co. v. I.C.C.*, 286 U.S. 299, 311-312 (1932); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

While no appellate court has considered the particular issue before the court, the Supreme Court in *United Air Lines, Inc. v. McMann*, ____U.S.____, 98 S.Ct. 444 (1977), the Fifth Circuit in *Taft*, supra, the Fourth Circuit in *McMann v. United Airlines, Inc.*, 542 F.2d 217 (4th Cir. 1976) and the Third Circuit in *Zinger v. Blanchette*, 549 F.2d 901 (C.A. 3, 1977) have considered the scope of section 4(f)(2) in regard to involuntary early retirement under retirement plans which prior to the passage of the ADEA had provisions by which employees were retired earlier than age 65.

The defendant urges that the Supreme Court in *McMann, supra*, adopted the definition of subterfuge of the Third Circuit in *Zinger*, supra. The Third Circuit held that where a retirement plan pays substantial benefits to the employees, that involuntary early retirement regardless of when the lower age was established cannot be a subterfuge.

This Court rejects the defendant's contention that the Supreme Court adopted the *Zinger* definition of subterfuge. The Supreme Court in *McMann, supra*, stated:

> So limited we find nothing to indicate Congress intended wholesale invalidation of retirement

> plans instituted in good faith *before its passage*, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide *pre-existing plans* as the Fourth Circuit concluded. (emphasis added).

____ U.S ____, 98 S.Ct. at 450.

Further, Mr. Justice White in his concurring opinion, who urged that the *Zinger* definition of subterfuge be adopted, noted:

> Because the Court relies *exclusively* upon the adoption date of United's retirement plan as a basis for concluding that McMann's forced retirement was not unlawful, I cannot join its opinion. Instead, I would adopt the approach taken by the Third Circuit in *Zinger v. Blanchette*, 549 F.2d 901 (CA 3 1977), . . . (emphasis added).

____ U.S. at ____, 98 S.Ct. at 452.

The Supreme Court chose to follow the rationale of the Fifth Circuit in *Taft, supra*, and decided the issue of subterfuge by holding that the defendant could not have committed a subterfuge where the plan preceded the enactment of the ADEA.

Following the decision in *McMann*, the Ninth Circuit, in *Marshall v. Hawaiian Telephone Company*, 575 F.2d 763 (C.A. 9, 1976), reviewed the first case concerning the applicability of section 4(f)(2) to preexisting plans.

There, the district court (*Dunlop v. Hawaiian Telephone Company*, 415 F.Supp. 330 (D. Haw., 1976)) had adopted the *Zinger* definition of subterfuge. However, on appeal the Ninth Circuit found the exemption applicable because the retirement occurred pursuant to a preexisting plan; thus following the rationale of *Taft, supra. Hawaiian Telephone Company*, 575 F.2d at 766.

Here, the plan was amended to lower the retirement age after the passage of the ADEA. This action by Eastern clearly constitutes a subterfuge to evade the purposes of the ADEA.[8] Eastern was specifically informed by TWU that its action in lowering the retirement age could constitute a violation of the ADEA. TWU then made a proposal which would bring the Plan into compliance with the ADEA. The defendant informed TWU that the Plan as amended was in compliance based on counsel's reading of *Taft, supra.* A fair reading of *Taft, supra,* does not lead to the conclusion that a post ADEA lowering of the retirement age was within the scope of section 4(f)(2). On the contrary, the majority in Taft clearly upheld the exemption because the involuntary retirement was effectuated pursuant to the terms of a plan preexisting the enactment of the ADEA:

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[8]Although *McMann, supra,* does hold that a defendant can not have committed a subterfuge where the retirement plan preceded the passage of the ADEA, the Supreme Court did not imply, nor does the Department of Labor suggest, that the lowering of a plan's retirement age by amendment enacted after passage of the ADEA *ipso facto* constitutes a subterfuge. Moreover, the mere fact that Eastern's plan was in existence long before the ADEA was enacted does not preclude the post-ADEA amendment from modifying the plan into a subterfuge.

> Taft's "Plan" was instituted in 1963. The Act was approved December 15, 1967. Quite obviously, Congress sought to avoid legal and constitutional problems likely to arise from any ex post facto effort to invalidate existing employee benefit plans. Consequently, it included the Section 4(f)(2) exception.

Taft, supra at 215.

Furthermore, Judge Tuttle issued a vigorous dissent in *Taft*. Additionally, it is clear upon reading the opinion that the Secretary of Labor's enforcement position was that section 4(f)(2) would not allow involuntary early retirement. Despite the clear indications in *Taft, supra*, that the defendant's action of lowering the retirement age of its Plan may, in fact, be illegal, Eastern took a calculated risk and failed to bring the Plan into compliance with the ADEA. Age is that form of involuntary early retirement that is contrary to the intent of Congress; this Court finds that age was the sole and only factor involved in the plan *sub judice*. Moreover, Eastern has presented no evidence to show that the early retirement amendment to its retirement plan had any business purpose other than arbitrary age discrimination. In the ordinary meaning of the word, therefore, Eastern's action clearly constituted a subterfuge to evade the purposes of the ADEA.

Three other district courts have had this particular issue before it. In *Marshall v. The Baltimore and Ohio Railroad*, 461 F.Supp. 362 (D. Md. 1978) the court followed the rationale of *Zinger, supra*, and found since substantial benefits were paid that the exemption was applicable.

However, the courts in *Davis v. Boy Scouts of America*, 457 F.Supp. 665 (D. N.J. 1978), and *Marshall v. Atlantic Container Line*, 18 E.P.D. ¶8849 (S.D. N.Y. 1978),[9] found it necessary to determine the facts concerning the lowering of the retirement age, therefore rejecting the rationale of *Zinger, supra*, in regard to the definition of subterfuge. This court concurs with the holdings in *Davis, supra*, and *Atlantic Container Line, supra*, in rejecting the *Zinger* definition of subterfuge.

The ruling herein accords with the 1978 Amendments of Section 4(f)(2) which clarifies the original intent of Congress in enacting Section 4(f)(2), that is, that no retirement plan "shall require or permit the involuntary retirement of any individual . . .". The report of the House on this matter stated:

> These amendments would also, therefore, clarify Section 4(f)(2) of the Age Discrimination in Employment Act so that employee benefit plans . . . cannot be an excuse for the involuntary retirement on account of age . . .[10]

The issue of injunction may be dealt with briefly. As the Fifth Circuit stated in *Hodgson v. First Federal Savings and Loan Association of Broward County, Florida*, 455 F.2d 818, 826 (C.A. 5, 1972):

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[9]The court's final ruling on the summary judgment motion is reported at *Marshall v. Atlantic Container Line*, 19, E.P.D. ¶9114 (S.D. N.Y. 1979).

[10]H. R. Rep. 95-527, 95th Congress, 1st Session at 107-108. *See also* S. Rep. 95-493, 95th Congress, 1st Session at 152, 160 and additional views of Senator Jacob Javits; H. R. Rep. 95-527, 95th Congress, 1st Session, additional views of Honorable Ted Weiss.

> It is to be noted that an injunction in this type of case is not a burdensome thing; it simply requires the employer to obey the law . . . The Labor Department ought not be charged with the responsibility for checking back on past violators to make certain they are obeying the law. Economy of administrative effort dictates that "after an employer has once violated the Act he should bear his own responsibility for the future." *Goldberg v. Cockrell*, 303 F.2d 811, 814 (CA5 1962).

See also, e.g., Hodgson v. Approved Personnel Service, Inc., 529 F.2d 760 (C.A. 4, 1975). Therefore, an injunction should issue.

The final issue remaining before the court is whether the violations were willful, which determines whether the two or three year Statute of Limitations of the Portal-to-Portal Act is applicable. Under the FLSA and the ADEA the issue of willfulness is an affirmative defense that must be plead and proven. *See e.g., Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (C.A. 5), *cert. denied*, 409 U.S. 948 (1972); *Brennen v. Heard*, 491 F.2d 1 (C.A.5, 1974); *Dunlop v. Westinghouse Electric Corp.*, 11 EPD ¶10,814 (S.D. Fla. 1976). The test of willfullness set forth in *Jiffy June, supra*, at 1142 is, "Did the employer know the FLSA was in the picture?" Therefore, the defendant must show that it did not and could not have known that its actions were governed by the ADEA.

THEREFORE, for the reasons stated, it is

ORDERED that defendant's motion for joinder be and hereby is DENIED. It is

FURTHER ORDERED that defendant's motion for summary judgment be and hereby is DENIED. It is

FURTHER ORDERED that an injunction should issue against the defendant enjoining the defendant from violating §4(a) of the ADEA.

FURTHER ORDERED that the defendant shall, within twenty days of entry of this Order, submit any evidence it may have which it contends shows that it did not know and could not have known that its actions were governed by the ADEA.

Entered this 26 day of July, 1979.

/s/SIDNEY M. ARONOVITZ
SIDNEY M. ARONOVITZ
United States District Judge

cc: Ms. Bobbye D. Spears, Office of the Solicitor,
ATTN: James L. Stine, Esq.
Richard P. Magurno, General Attorney
Francis V. LaRuffa, Esq., Regional Solicitor,
ATTN: Theodore T. Gotsch, Esq.
George F. Galland, Esq., Olga Boikess, Esq., Thomas A. Johnson, Esq., Galland, Kharasch, Calkins & Short

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JUDGMENT

FILE NO.
78-316-CIV-SMA

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

EASTERN AIRLINES, INC.,
Defendant.

The plaintiff has moved for summary judgment, and the Court having entered its Memorandum Opinion and Order, and in accordance therewith, it hereby is:

ORDERED, ADJUDGED and DECREED that defendant, its officers, agents, servants, employees and all persons acting or claiming to act in their behalf or interest be and they hereby are, permanently enjoined from violating the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§651, *et seq.*, hereinafter referred to as ADEA in the following manner:

They shall not, contrary to Section 4(a)(1) of ADEA and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§201, *et seq.*, retire, discharge, refuse to hire or otherwise discriminate against any

individual in the protected age group because of such individual's age.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendant shall within 30 days make a bona fide offer of reinstatement as a flight attendant to John Steger without loss of seniority and benefits.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant is hereby restrained from withholding payment of minimum wages and overtime compensation due employees for the periods of employment and in the amounts indicated with respect to each, as set forth in Schedule "A" attached hereto with interest thereon at 7% per annum from dates such amounts became due until paid.

To comply with this provision of this Judgment, defendant shall deliver to plaintiff's attorneys within thirty days separate certified or cashier's checks or money orders payable, in the alternative to "[named employee] or Wage & Hour Division – Labor" in the amounts stated, less deductions required by law as to each employee plus interest.

The defendant also shall provide plaintiff's attorneys with a schedule showing its employer I.D. number and last-known address, social security number, gross amount, deductions, interest and net amount as to each employee listed on Schedule "A".

Plaintiff, thereupon, shall distribute such checks to the named employees, or to their personal

representatives, or estates and any check not so distributed by the plaintiff within the period of one (1) year after payment pursuant to this Judgment, because of inability to locate the proper persons or because of such persons' refusals to accept such sums, shall be deposited with the Treasurer of the United States as miscellaneous receipts. It is

FURTHER ORDERED that costs of this action hereby are taxed to the defendant for which execution may issue.

This 15 day of November, 1979.

UNITED STATES
DISTRICT JUDGE

SCHEDULE "A"

NAME	PERIOD	AMOUNT
JOHN GUTHRIE	8/1/74 – 8/1/77	$33,791.84
ROBERT K. McCANCE	7/1/74 – 7/1/77	31,870.52
TOIVO M. PUOTINEN	5/1/76 – 5/1/79	44,588.88
JOHN V. ROUTH	6/1/75 – 6/1/78	32,942.65
EDWARD SHOETTLY	7/1/75 – 7/1/78	33,369.24
MATTHEW TYNDALL	9/1/74 – 9/1/77	33,778.36
LESLIE VOGET	7/1/74 – 7/1/77	34,778.36
JOHN STEGER	4/1/77 to date	32,834.09*

*As of October 1, 1979 plus an additional $1,132.21 each month until the date of a *bona fide* offer of reinstatement.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

FILE NO. 78-316-Civ-SMA

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

EASTERN AIRLINES, INC.,
Defendant.

AMENDED JUDGMENT

The plaintiff has moved for summary judgment, and the Court having entered its memorandum Opinion and Order, and in accordance therewith, it hereby is:

ORDERED, ADJUDGED and DECREED that defendant, its officers, agents, servants, employees and all persons acting or claiming to act in their behalf or interest be and they hereby are, permanently enjoined from violating the provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §651, et seq., hereinafter referred to as ADEA in the following manner:

They shall not, contrary to Section 4(a)(1) of ADEA and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201, *et seq.*, retire, discharge, refuse to hire or otherwise discriminate against any

individual in the protected age group because of such individual's age.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the defendant shall within 30 days make a *bona fide* offer of reinstatement as a flight attendant to John Steger without loss of seniority and benefits.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant is hereby restrained from withholding payment of minimum wages and overtime compensation due employees for the periods of employment and in the amounts indicated with respect to each, as set forth in Schedule "A" attached hereto with interest thereon at 7% per annum from the dates such amounts became due until paid.

To comply with this provision of this Judgment, defendant shall deliver to plaintiff's attorneys within 30 days separate certified or cashier's checks or money orders payable, in the alternative to "[named employee] or Wage and Hour Division — Labor" in the amounts stated, less deductions required by law as to each employee plus interest.

The defendant also shall provide plaintiff's attorneys with a schedule showing its employer I.D. number and last-known address, social security number, gross amount, deductions, interest and net amount as to each employee listed on Schedule "A."

Plaintiff, thereupon, shall distribute such checks to the named employees, or to their personal

representatives, or estates and any check not so distributed by the plaintiff within the period of one (1) year after payment pursuant to this Judgment, because of inability to locate the proper persons or because of such persons' refusals to accept such sums, shall be deposited with the Treasurer of the United States as miscellaneous receipts. It is

FURTHER ORDERED that costs of this action hereby are taxed to the defendant for which execution may issue.

This 16 day of November, 1979.

UNITED STATES
DISTRICT JUDGE

SCHEDULE "A"

NAME	PERIOD	AMOUNT
John Guthrie	8/1/74 – 8/1/77	$33,791.84
Robert K. McCance	7/1/74 – 7/1/77	31,870.52
Toivo M. Puotinen	5/1/76 – 5/1/79	44,588.88
John V. Routh	6/1/75 – 6/1/78	32,942.65
Edward Shoettly	7/1/75 – 7/1/78	33,369.24
Matthew Tyndall	9/1/74 – 9/1/77	33,778.36
Leslie Voget	7/1/74 – 7/1/77	34,778.36
John Steger	4/1/77 to date	32,834.09*

*As of October 1, 1979 plus an additional $1,132.21 each month until the date of a *bona fide* offer of reinstatement.

APPENDIX C

STATUTE INVOLVED

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 29 U.S.C. §621 *et. seq.*

Section 4(a)(1)

"It shall be unlawful for an employer —

"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . ."

29 U.S.C. §623(a)(1) (1975)

Section 4(f)(2)

"It shall not be unlawful for an employer, employment agency, or labor organization —

"(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act."

29 U.S.C. §623(f)(2)

CERTIFICATE OF SERVICE

I, Richard P. Magurno, Counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing petition for writ of certiorari in the United States Mail, first class postage prepaid, this 9th day of July, 1981, addressed to:

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Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,

No. 81-49

In the Supreme Court of the United States

OCTOBER TERM, 1980

EASTERN AIR LINES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether an amendment, effective in 1974, to petitioner's retirement plan, lowering the mandatory retirement age for flight attendants from age 65 to 62, violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-14) has not been reported.[1] The opinion of the district court (Pet. App. 15-28) is reported at 474 F. Supp. 364.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on April 14, 1981. The petition for a writ of certiorari was filed on July 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The opinion is designated "Do not publish." The Equal Employment Opportunity Commission moved for publication of the opinion on April 29, 1981. The court of appeals has not yet ruled on the motion.

STATUTE INVOLVED

As originally enacted, Section 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(f)(2) provided:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter * * *.[2]

STATEMENT

In August 1977, the Secretary of Labor[3] filed this employment discrimination action alleging that petitioner, Eastern Air Lines, violated the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. 621 *et seq.*, by amending its retirement plan in 1973 to lower the normal retirement age for flight attendants from 65 to 62

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[2]Section 4(f)(2) has since been amended by Section 2(a) of Pub. L. No. 95-256, 92 Stat. 189, 29 U.S.C. (Supp. III) 623(f)(2), to provide, (emphasis added):

> (f) It shall not be unlawful for an employer * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, *except that * * * no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual * * * [between 40 and 69 years of age] because of the age of such individual.*

[3]Congress and the President transferred the Secretary of Labor's enforcement responsibilities under the ADEA to the respondent, Equal Employment Opportunity Commission (the "EEOC"), on July 1, 1979. Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). The EEOC was substituted as plaintiff in this action on January 23, 1980.

and subsequently requiring eight flight attendants to retire involuntarily pursuant to the amended plan. Petitioner contended that the amendment and resulting retirements fell within the exception in Section 4(f)(2), 29 U.S.C. 623(f)(2), as it stood prior to 1978, for personnel actions taken in "observ[ance of] the terms of a bona fide * * * retirement * * * plan, which is not a subterfuge to evade the purposes of [the Act]."

1. The facts in this case were stipulated and are summarized in the court of appeals' opinion (Pet. App. 5, 16-19). Since October 1, 1947, petitioner has maintained a retirement plan for its flight attendants. The plan requires participants to retire at the "normal retirement age." Until December 31, 1973, the "normal retirement age" was 65. On April 26, 1973, petitioner and the Transport Workers Union ("TWU") entered into a letter of agreement amending their collective bargaining agreement to establish, effective January 1, 1974, age 62 as the normal retirement age for flight attendants. In June 1974, during negotiations for a new collective bargaining agreement, the TWU initially proposed that the retirement age for flight attendants be reduced to age 60, with an option to work until 62. However, on July 15, 1974, after it had been advised by counsel that its original proposal would violate the ADEA, the union amended its proposal to give employees the option to remain until age 65. At that time, the union informed Eastern that the existing plan was of questionable legality. The issue was not discussed further until the final day of negotiations, at which time petitioner advised the union that its counsel believed the existing plan complied with the ADEA. On November 8, 1974, petitioner and the TWU formally entered into a collective bargaining agreement which retained the provision treating age 62 as the normal retirement age for flight attendants. During the period from January 1, 1974, through June 30, 1977, eight flight attendants were involuntarily retired at age 62 (Pet. App. 17).

Effective July 1, 1977, the TWU and petitioner entered into a collective bargaining agreement which specified that the normal retirement age was 62 but gave employees the option to remain employed until age 65 (Pet. App. 17-18).

2. The district court granted the Secretary of Labor's motion for partial summary judgment and denied Eastern's motion for summary judgment (Pet. App. 15-28). The court held that the mandatory retirement provision of Eastern's plan was a subterfuge to evade the purpose of the ADEA within the meaning of Section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2) (Pet. App. 21-26). The court emphasized that Eastern had amended the retirement plan after the passage of the Act to provide for a lower retirement age, had been informed by the union of the questionable legality of its actions, and had "presented no evidence to show that the early retirement amendment to its retirement plan had any business purpose other than arbitrary age discrimination" (Pet. App. 24-25). The district court granted relief in the form of back pay for the eight affected employees, reinstatement for one employee, and an injunction against future violations of the ADEA (Pet. App. 29-36).

A unanimous court of appeals affirmed. The court rejected petitioner's argument that a retirement plan which is amended after the passage of the ADEA can never be a subterfuge to evade the Act if the plan is bona fide, *i.e.*, exists and pays substantial benefits (Pet. App. 7-11). The court of appeals concluded that where an employer cannot show a lack of intent to evade the ADEA by the pre-Act vintage of a particular retirement plan, the employer must show that its actions fall within the Section 4(f)(2) exception by coming forward with some other evidence demonstrating a lack of discriminatory animus against older workers (Pet. App. 11-12). The court of appeals concluded that petitioner's explanation for amendment of its retirement plan—i.e., that the union had initially suggested lowering

the normal retirement age and that this suggestion was adopted in a collective bargaining agreement—was insufficient to show non-discriminatory intent, especially in view of petitioner's "continued adherence to the amended plan in the face of the Union's changed position" (Pet. App. 13). The court of appeals also noted petitioner's awareness, at the time it agreed to the revision, of that court's decision in *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (1974), which treats the question whether a retirement plan is bona fide, and whether it represents a subterfuge to defeat the purposes of the ADEA, as distinct questions.

ARGUMENT

The court of appeals' conclusion—that petitioner violated the ADEA when, in 1974, it amended its retirement plan by reducing the mandatory retirement age for its flight attendants—is consistent with the plain language of Section 4(f)(2) of the ADEA as originally enacted, the decision of this Court in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), and the decisions of the other courts of appeals to consider the issue. Moreover, because Congress amended Section 4(f)(2) in 1978 to outlaw *all* involuntary retirements, based on a retirement plan, of persons within the protected age group (see note 2, *supra*), the issue lacks prospective importance and does not merit review by this Court.

1. Under the plan at issue in this case, petitioner involuntarily retired eight flight attendants solely because of their age. Petitioner's action violated the ADEA's basic prohibition against age discrimination unless it fell within the then-available exemption for bona fide retirement plans which are not a subterfuge to evade the purpose of the ADEA. Section 4(f)(2), 29 U.S.C. 623(f)(2).

In *McMann, supra*, 434 U.S. at 203, this Court defined "subterfuge" as it appears in Section 4(f)(2) as a "scheme, plan, stratagem, or artifice of evasion" and, thus, focused

upon the employer's intent in establishing the plan. The Court ruled that a provision in a plan adopted prior to the enactment of the ADEA could not be a subterfuge to evade an Act passed years later. The Court explained, 434 U.S. at 203:

> To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes * * * a remarkable prescience to the employer.[4]

Where, as here, however, a retirement plan was amended after the enactment of the ADEA, an employer cannot demonstrate the absence of an impermissible discriminatory motive by pointing to the chronology of events.[5] The other courts of appeals which have considered the issue have agreed with the court below that an employer must advance legitimate non-discriminatory reasons for lowering the retirement age of its employees after the passage of the Act. See *Smart* v. *Porter Paint Co.*, 630 F. 2d 490, 495 (7th Cir. 1980); *EEOC* v. *Baltimore & O. R.R.*, 632 F. 2d 1107, 1113 (4th Cir. 1980), petition for cert. pending, No. 80-1929 (filed May 16, 1981). Petitioner's interpretation of Section 4(f)(2) would render the qualifying language "which is not a subterfuge to evade the purposes of this chapter" mere surplusage, adding nothing to the requirement that the plan be "bona fide."

2. Petitioner contends (Pet. 11-12) that its post-ADEA amendment of its plan could not have been a subterfuge because its retirement plan paid substantial benefits to

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[4]Consistent with *McMann*, the court of appeals in the instant case concluded that one legislative purpose underlying Section 4(f)(2) was "to 'grandfather' those pre-existing retirement plans which might not otherwise have survived judicial scrutiny under the new guidelines" (Pet. App. 10).

[5]The burden is on the party seeking to invoke Section 4(f)(2) to show that its actions were covered by the exception. *Smart* v. *Porter Paint Co.*, 630 F. 2d 490, 493 (7th Cir. 1980).

those involuntarily severed from employment.[6] Contrary to petitioner's assertion (Pet. 6, 8-10), no court of appeals which has considered an employer's post-ADEA actions has endorsed petitioner's contention and there is no conflict among the circuits on this issue. The only case cited by petitioner which addresses a mandatory retirement provision adopted after the passage of the ADEA is *Carpenter* v. *Continental Trailways*, 635 F. 2d 578 (6th Cir. 1980), cert. denied, No. 80-1578 (May 18, 1981).[7] In *Carpenter*, the

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[6]Petitioner appears to have abandoned its contention that the fact that the union initially proposed the amendment justified its continued adherence to the age 62 retirement requirement, since its petition alleges only that the court of appeals misinterpreted Section 4(f)(2). In any event, the court of appeals' decision in this respect is sound, for the reasons stated by the court (see page 4, *supra*). Moreover, the right to be free from invidious age discrimination is secured to the individual and cannot be bargained away in a collective agreement whose provisions do not otherwise satisfy Section 4(f)(2). Cf. *Barrentine* v. *Arkansas-Best Freight System, Inc.*, No. 79-2006 (Apr. 6, 1981), slip op. 11, 17.

[7]All of the other court of appeals decisions cited by petitioner either upheld mandatory retirement provisions adopted prior to the ADEA or do not address the issue presented here. In *Marshall* v. *Hawaiian Telephone Co.*, 575 F. 2d 763, 766 (9th Cir. 1978), the Ninth Circuit ruled, following *McMann, supra*, that a bona fide plan established in 1931 could not be a subterfuge to evade the purposes of the ADEA. Similarly in *Zinger* v. *Blanchette*, 549 F. 2d 901 (3d Cir. 1977), cert. denied, 434 U.S. 1008 (1978), a case decided prior to *McMann*, the court upheld an involuntary retirement effectuated under a pre-Act plan. The court thought that adoption prior to enactment of the ADEA could not insulate a retirement plan from invalidation as a subterfuge (549 F. 2d at 904-905), but reasoned that a plan which pays substantial benefits, regardless of its date of origin, could not be a subterfuge to evade the ADEA. After *McMann*, however, the authority of *Zinger* is clouded. See 434 U.S. at 207-208 (White, J., concurring). In *EEOC* v. *Shell Oil Co.*, 637 F. 2d 683, 684 (9th Cir. 1981), which also involved a plan or provision adopted before the ADEA's passage, the court did not consider the subterfuge issue at all, but only whether Shell Oil acted in observance of its plan and whether the 1978 amendment to Section 4(f)(2) was retroactive. Similarly, in *Sikora* v. *American Can Co.*, 622 F. 2d 1116, 1124 (3d Cir. 1980), the Third Circuit decided only the question of retroactivity, remanding to the district court for consideration of the distinct questions whether the plan was bona fide, and

Sixth Circuit examined the involuntary retirement at age 61 of an employee pursuant to a plan first adopted in 1974. The *Carpenter* court treated the questions whether the plan was bona fide and whether it was a subterfuge to evade the Act as distinct inquiries.[8] The Sixth Circuit ultimately found no subterfuge in the adoption of the retirement plan before it based upon "[e]vidence * * * that the plan was a legitimate instrument created to provide for the retirement of the company's employees," but acknowledged that a "plan * * * set up in 1974, after the enactment of the ADEA * * * should undergo more thorough scrutiny to determine whether its early retirement provisions were established to evade the purposes of the Act." 635 F. 2d at 581. The application of this standard to the record of a particular case is essentially a factual matter.[9] Any difference in emphasis between the analysis employed by the Sixth Circuit and that employed by the Fourth, Fifth and Seventh Circuits is insignificant given the 1978 amendment to the Act, which controls future cases.

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whether it was a subterfuge to evade the purposes of the ADEA. As to the latter inquiry, the court noted (*ibid.*):

> The Supreme Court held in *McMann* that a plan established before passage of the Act in 1967 was not a subterfuge. Alterations made to a plan after [the] ADEA was in effect, however, may be examined to see if the changes were designed to evade the purposes of the Act.

[8]Compare 635 F. 2d at 581 ("The final issue is whether Trailway's plan is a subterfuge.") with 635 F. 2d at 580 ("Trailways' retirement plan is bona fide. A plan that exists and pays substantial benefits—as does Trailways'—satisfies this criterion.").

[9]The retirement plan at issue in *Carpenter* was evidently first established in 1974. *Id.* at 580-581. The court observed that "it appears to have been adopted for the same reason that many companies and governmental agencies have adopted * * * retirement plans. Evidence exists that the plan was a legitimate instrument created to provide for the retirement of the company's employees." *Id.* at 581. Such a finding could not be made in the instant case, for the lowering of the retirement age at issue here serves no such business purpose. See *Sikora* v. *American Can Co.*, *supra*, 622 F. 2d at 1124, and note 7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

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